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No. 91-1703

In The

Supreme Court of the United States

October Term, 1991

DENNIS CHARLES HALL,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Georgia

BRIEF IN OPPOSITION ON BEHALF OF RESPONDENT

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QUESTIONS PRESENTED

I.

Should this Court grant certiorari merely to review Petitioner's disagreement with a factual determination made by the Supreme Court of Georgia and the trial court with respect to the race-neutral character of the prosecution's use of peremptory strikes?

II.

Should this Court grant certiorari to review the Supreme Court of Georgia's analysis under *Batson v. Kentucky* where no legal conflict exists between the Georgia court and other courts?

III.

Should this Court grant certiorari merely to re-examine the Supreme Court of Georgia's fact-specific decision finding the evidence was sufficient to support the jury's finding of a specific statutory aggravating circumstance and imposition of a death sentence?

IV.

Should this Court grant certiorari to review Petitioner's claim that the state appellate court allegedly usurped the jury's role in affirming the statutory aggravating circumstance when this issue factually lacks merit?

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BRIEF IN OPPOSITION ON BEHALF OF RESPONDENT

PART ONE

STATEMENT OF THE CASE

Petitioner, Dennis Charles Hall, was originally indicted on May 1, 1990, in the Superior Court of Barrow County, Georgia, on one count of malice murder, one count of felony murder, two counts of cruelty to children, and one count of discharging a firearm near a public street, in connection with the shooting death of Petitioner's son, Adrian Hall. (R. 3). Petitioner was reindicted on August 6, 1990; this second indictment was substantially the same as the first except that the spelling of the victim's name in counts three and four had been changed.

(R. 7). The state filed a notice of intent to seek the death penalty on May 3, 1990, and a second notice on June 25, 1990, alleging the statutory aggravating circumstance upon which it would rely. (R. 14; 146). The state filed notice of intent to introduce similar transactions on July 23, 1990, and an amendment to the notice of intent to introduce similar acts on August 9, 1990.

Pursuant to a jury trial on August 27-30, 1990, the jury found the Petitioner guilty on all counts of the indictment. Following the sentencing phase of the trial, the jury found the existence of the O.C.G.A. § 17-10-30(b)(7) statutory aggravating circumstance in that the offense of murder was "wantonly vile – depravity of mind – horrible – inhuman in that it involved torture," and sentenced Petitioner to death. (R. 221-22). In accordance with the jury's binding recommendation, the trial court sentenced Petitioner to death for the murder conviction; to consecutive sentences of ten years each on the two cruelty to children convictions; and to a concurrent twelve month sentence for the conviction of discharging a firearm near a public street.

The Supreme Court of Georgia affirmed Petitioner's convictions and sentences on December 3, 1991, and denied reconsideration on December 18, 1991. *Hall v. State*, 261 Ga. 778, 415 S.E.2d 158 (1991). Petitioner now seeks this Court's review of that decision.

PART TWO

STATEMENT OF FACTS

On direct appeal, the Supreme Court of Georgia found the following facts:

> During his marriage, Hall's alcohol abuse and abusive behavior towards his wife and three children resulted in numerous occasions in which the police were called to restore order to the household. Hall once locked his family out of the house when the outside temperature was below freezing. On another occasion, his wife told police that Hall had struck her in the head with a pistol. He also once threatened to shoot his wife and fired a shot into the air. On none of these occasions, however, did she press charges.
>
> On Sunday, January 7, 1990, Hall began drinking early in the morning and drank throughout the day. As Hall watched television that afternoon, his son Adrian played with a toy remote-controlled tractor. Hall told Adrian to stop, because the toy was interfering with his television reception. When Adrian did not cease playing immediately, Hall went to the boy and struck him in the head. This precipitated an argument between Hall and his wife concerning the necessity for the severity of Hall's punishment. Hall responded by searching for his shotgun. His older daughter took the shotgun outside and hid it in the car. Meanwhile, Adrian got the pistol and took it outside. Hall found the shotgun and loaded it while his wife tried unsuccessfully to take it from him. He approached Adrian, who stood 10 to 15 feet away saying, "Don't shoot me, don't shoot me." Hall shot him in the chest as his wife, two daughters and his

next door neighbors looked on. Hall went home, but returned a few minutes later to Adrian's body. Hall kissed his deceased son and told him he loved him. When his neighbor suggested it was "a little too late for that, you've done killed him," Hall responded, "Shit happens," and bragged, "I couldn't learn him nothing by beating him with a belt, so I guess I learned him something this time."

A test administered later that afternoon showed that Hall had a blood alcohol level of .32 grams percent. All who observed Hall that afternoon, however, testified that he was not overly intoxicated, was steady on his feet, and had only slightly slurred speech.

In a post-arrest statement to police, Hall claimed he shot his son in self-defense. Later, he claimed it was an accident.

Hall, 261 Ga. at 778-79.

REASONS FOR NOT GRANTING THE WRIT

I. THIS COURT SHOULD DECLINE TO GRANT CERTIORARI TO REVIEW A FACT-SPECIFIC DECISION OF THE SUPREME COURT OF GEORGIA PROPERLY APPLYING THE STANDARD OF *BATSON V. KENTUCKY.*

Petitioner first seeks review by this Court of the decision of the Supreme Court of Georgia holding that the prosecution's use of peremptory strikes at Petitioner's trial did not violate this Court's holding in *Batson v. Kentucky*, 476 U.S. 79 (1986), prohibiting the discriminatory use of such strikes. Petitioner specifically asserts that

the Georgia Court's alleged failure to inquire "whether the prosecutor's proffered reasons for striking blacks were comparably applied to whites" creates a conflict between the Georgia Court and two federal courts of appeals and two state supreme courts regarding the appropriate analysis of peremptory strikes under *Batson*. Respondent submits that the conflict asserted by Petitioner does not in fact exist, and Petitioner is merely asking this Court to reconsider the factual determinations made by the trial court and the Supreme Court of Georgia with regard to this issue.

In affirming the trial court's holding that the prosecution had articulated non-racial reasons sufficient to rebut a prima facie case under *Batson*, the Georgia Supreme Court evaluated the reasons expressed by the prosecutor and the analysis by the trial court. *Hall v. State*, 261 Ga. at 779-80. At trial the prosecutor gave reasons for his use of the ten strikes allotted the state upon six black and four white prospective jurors. (T. 309-23, 667). The Georgia Supreme Court noted that, although the prosecutor used six of ten peremptory strikes to strike the six black prospective jurors on the qualified venire, "the trial court stated that it was concerned only with the prosecutor's final peremptory strike." 269 Ga. at 779. Nevertheless, the Georgia Court evaluated the reasons for the first five peremptory strikes, observing that those five "were struck either because they were well acquainted with the defendant and his family, or closely related to persons who had been struck, in trouble with the law, or had expressed a reluctance to impose the death sentence." *Id.* at 779.

The Court also carefully examined the reason given by the prosecutor for his last strike: that despite his plans to save the final strike for a white prospective juror with "bad feelings" toward the judicial system, the strike was exercised against the final black juror because that "juror entered the courtroom with the defendant's family and sat immediately behind the defendant's mother." *Id.* The Georgia Supreme Court held that while this "reasonable suspicion about a prospective juror's impartiality" did not "rise to the level justifying exercise of a challenge for cause," the Court would not "condemn the prosecutor's reluctance to gamble on the significance of [the juror entering the courtroom with and sitting next to Petitioner's family]." *Id.* at 780. Further, the Georgia Court explained that the additional factors that both the defendant and the victim were black and that only one, rather than several of the prosecutor's reasons, was suspect supported the trial court's conclusion that there was no violation of *Batson*.

In *Batson v. Kentucky*, this Court held that the state may not constitutionally exercise peremptory strikes against black prospective jurors in a discriminatory fashion. In establishing the procedure for evaluating claims of discriminatory use of peremptory strikes, this Court noted that "the trial court should consider all relevant circumstances" surrounding the exercise of those strikes and expressed confidence in the abilities of trial judges to evaluate the facts. *Batson v. Kentucky*, 476 U.S. at 97-98. This Court has since continued to adhere to the view that evaluation of the reasons articulated by the prosecution is merely an issue of fact and that determination by the trial

court will be afforded "great deference" on appeal. *Hernandez v. New York*, ___ U.S. ___, 111 S.Ct. 1859, 1868-69 (1991). *See also Hernandez*, 111 S.Ct. at 1873. (O'Connor, J. concurring). Thus, the issue of discriminatory intent and the use of peremptory strikes continues to turn on consideration of "all relevant circumstances" presented to the trial court.

Petitioner, however, now asserts that because the Georgia Supreme Court did not specifically discuss whether the prosecutor's stated reasons for blacks who were struck applied comparably to whites who were not struck (and for whom reasons were not given), some conflict exists between the court and other courts with respect to the "proper" evaluation of the prosecutor's reasons. In support of this contention, Petitioner cites two cases from federal courts of appeals, *Walton v. Caspari*, 916 F.2d 1352 (8th Cir. 1990), *cert. denied*, ___ U.S. ___, 111 S.Ct. 1337 (1991); *United States v. Horsley*, 864 F.2d 1543 (11th Cir. 1989), and two cases from two states' highest courts, *Slappy v. State*, 522 So. 2d 18 (Fla.) *cert. denied*, 487 U.S. 1219 (1988); *Stanley v. State*, 313 Md. 50, 542 A. 2d 1267 (1988).

Petitioner asserts that those courts "considered whether the trial court had carefully inquired into the prosecution's motives by examining his treatment of similarly situated white and black jurors." (Petitioner's brief at 10). An examination of the four cases cited by the Petitioner in support of this alleged conflict reveals that *Walton v. Caspari*, 916 F.2d at 1362, dealt with the application of *Swain v. Alabama*, 380 U.S. 202 (1965), which *Batson* overruled, and that the other three merely pointed out that different treatment of "similarly situated" white and

black prospective jurors is one of the "relevant circumstances" to be examined under *Batson*.

Petitioner further asserts that the alleged conflict has resulted from "[t]he failure of Georgia's trial and appellate courts to acknowledge the need for this careful inquiry [of the treatment of similarly situated white and black jurors]." (Petitioner's brief at 10). However, the Supreme Court of Georgia has held that one of the relevant factors in considering a *Batson* claim raised in the trial courts of Georgia is whether "similarly situated white jurors were not challenged." *Gamble v. State*, 257 Ga. 325, 329-30, 357 S.E.2d 792 (1987). In fact, Petitioner cited *Gamble* in his brief to the Georgia Supreme Court as support for his contention that alleged disparate treatment of similarly situated black and white jurors indicated alleged discriminatory use of peremptory strikes by the prosecution. Since *Gamble*, the Georgia Court has reiterated that such comparison remains a viable factor in considering *Batson* claims. *See Pitts v. State*, 259 Ga. 745, 749, 386 S.E.2d 351 (1989). Thus, the alleged conflict between the Georgia courts and other appellate courts alleged by Petitioner simply does not exist.

The cases merely demonstrate that the lower courts examine the "relevant circumstances" surrounding the prosecution's use of peremptory strikes in each case as mandated in *Batson*. The Georgia courts, like other courts considering the issue, consider the alleged disparate treatment of white and black potential jurors in appropriate cases. Apparently, the Georgia Supreme Court did not find it necessary to discuss in its opinion that particular aspect of Petitioner's argument under the facts of this case.

Moreover, Petitioner asks this Court to grant certiorari to formulate a rule for *Batson* analysis which compares a prosecutor's articulated reasons for the use of strikes against mere conjecture and supposition as to why a prosecutor did not challenge other allegedly "similarly situated" prospective jurors. Respondent questions the fairness and reliability of using supposition about the prosecutor's mental processes for not striking jurors to defeat the prosecutor's articulated reasons for striking jurors. Petitioner further advocates a rule that would automatically deem black and white prospective jurors "similarly situated" merely because they have one identified characteristic in common, although other characteristics may differ, and it is the combination of those characteristics which is dispositive to a prosecutor. Such a mechanistic approach seems at odds with this Court's preference for a trial court remaining free to consider "relevant circumstances," whatever those may be, under the facts of each case.

In essence, Petitioner seeks to have this Court reexamine the application of established law to the facts presented in his case. This Court does "not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925). Therefore, since the decision below was an appropriate application of the law established by this Court, this issue presents nothing for this Court's review.

II. THIS COURT SHOULD DECLINE TO GRANT CERTIORARI TO REVIEW A FACT SPECIFIC DECISION OF THE SUPREME COURT OF GEORGIA APPLYING ITS PRIOR DECISIONS TO FIND THE EVIDENCE SUFFICIENT TO AUTHORIZE A DEATH SENTENCE.

Petitioner next seeks this Court's review of the state appellate court's decision affirming the imposition of the death penalty based on the jury's finding of the O.C.G.A. § 17-10-30(b)(7) statutory aggravating circumstance. Petitioner asserts that the decision affirming his sentence of death conflicts with this Court's holdings in *Godfrey v. Georgia*, 446 U.S. 420 (1980), and *Gregg v. Georgia*, 428 U.S. 153 (1976), that a capital sentencing scheme narrow the class of cases in which the death penalty may be imposed to distinguish cases warranting death sentences from other murder cases. Respondent submits that, contrary to Petitioner's contentions, the decision in this case is not an unprecedented construction of the § (b)(7) statutory aggravating circumstance and that Petitioner's main quarrel is his disagreement with the state court's conclusion that the evidence supported the jury's verdict as to sentence.

By way of background, under Georgia's death penalty statute setting forth ten statutory aggravating circumstances which may authorize a death sentence, the death penalty may be imposed where the jury finds beyond a reasonable doubt that the murder "was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." O.C.G.A. § 17-10-30(b)(7). In *Godfrey v. Georgia*, this Court rejected the assertion that this

statutory aggravating circumstance was unconstitutional on its face but concluded that it was unconstitutionally applied in Godfrey's case where the jury found only that the murder was "outrageously or wantonly vile, horrible and inhuman." *Godfrey*, 446 U.S. at 426.

In *Hance v. State*, 245 Ga. 856, 268 S.E.2d 339, *cert. den.*, 449 U.S. 1067 (1980), the Georgia Supreme Court adopted a limiting construction of § (b)(7) in light of *Godfrey*. The Court held that this circumstance consists of "two major components, the second of which has three sub-parts, as follows: (I) the offense of murder was outrageously or wantonly vile, horrible or inhuman (II) in that it involved (A) aggravated battery to the victim, (B) torture to the victim, or (C) depravity of mind of the defendant." In determining whether a jury's finding of this circumstance is supported by the evidence, "the evidence must be sufficient to satisfy the first major component of the statutory aggravating circumstance and at least one sub-part of the second component, as hereinafter set forth." *Id.* at 860-61. The Court held that the phrases "outrageously or wantonly vile, horrible or inhuman" were words of common understanding. *Id.* Not only must the jury find this first component, but the jury must only find at least one of the three sub-parts of the second component – i.e., "an aggravated battery to the victim, torture of the victim, or depravity of mind of the defendant. . . . " *Id.*

The Court further noted that "torture" occurs when the victim is subjected to "serious physical abuse before death," that serious sexual abuse could constitute "serious physical abuse," and that aggravated battery

must also occur before the victim's death. *Id.* More importantly, the Court held:

> Evidence of psychological abuse by the defendant to the victim before death where it is shown to have resulted in severe mental anguish to the victim in anticipation of physical harm may amount to serious physical abuse (i.e., torture of the victim), and also will support a finding of depravity of mind of the defendant.

Hance, 245 Ga. at 861. The Court went on to note that only facts occurring prior to death may be considered as to aggravated battery and torture and a defendant who tortures his victim or commits an aggravated battery upon the victim prior to death may be found to have a depraved mind. "In determining whether the evidence shows 'depravity of mind,' the age, and the physical characteristics of the victim may be considered." *Id.* Further, depravity of mind also permits consideration of the defendant's acts after the victim's death: "a defendant who mutilates or seriously disfigures the victim's body after death . . . or who commits a sex act upon the victim's body after death may be found to have a depraved mind. . . . " *Id.*

In Petitioner's case the jury returned a verdict finding the following statutory aggravating circumstance to exist beyond a reasonable doubt:

> Wantonly vile – depravity of mind – horrible – inhuman in that it involved torture.

(R. 221).

The Georgia Supreme Court found that this verdict was a valid finding of this aggravating circumstance as it

included "all of the essential elements of the § (b)(7) circumstance and all the findings necessary to sustain a § (b)(7) finding." *Hall v. State*, 261 Ga. at 783, relying in part on *Hance*. *Compare, Godfrey v. Georgia*, 446 U.S. at 428-29. The Court went on to describe the evidence of a pattern of abuse of the victim by Petitioner, ending with Petitioner chasing down and shooting his ten year old son as the boy begged not to be shot, followed by Petitioner dismissing the significance of the killing by claiming, "Shit happens," and later attempting to justify the act both as a lesson in discipline and as an act of self-defense authorized the jury to find that the murder was "outrageously or wantonly vile, horrible or inhuman, and that it involved mental torture and depravity of mind." *Hall*, 261 Ga. at 783.

In a special concurrence joined by two justices of the Georgia Supreme Court, whose concurrence was necessary to the majority required to affirm the death sentence, two justices found that a determination of whether the evidence was sufficient to establish torture was "not essential to the resolution of this case." *Id.* at 785. The concurring justices, reasoning that only one of the elements of torture, depravity of mind, or aggravated battery to the victim was necessary to sustain the death penalty, held, "Whether or not the factual circumstances in this case rise to 'torture,' a jury most assuredly might find the murder by Hall of his minor son in the presence of his minor daughters, along with his conduct immediately following the murder, demonstrated 'depravity of mind.' " *Id.*

The dissent reasoned that "the evidence in this case does not establish that [Petitioner's] conduct was so

'outrageously or wantonly vile, horrible or inhuman' as to distinguish this killing from 'ordinary murders for which the penalty of death is not appropriate.' " *Id.* at 786. The dissent continued by analyzing the facts of a number of cases in which the (b)(7) aggravating circumstance had been upheld, without regard to which of the sub-parts of torture, aggravated battery and depravity of mind had been found, and concluded that the evidence in the instant case did not demonstrate torture or depravity of mind and did not support the jury's verdict.

Petitioner asserts that, based on the concurring opinion, a majority of the Supreme Court justices did not find that the evidence supported a finding of torture. On that basis, Petitioner contends that the Georgia Supreme Court failed to follow its own precedent, which Petitioner contends allegedly provides that depravity of mind alone cannot support a death sentence, but which Respondent submits is erroneous. Petitioner also contends that the state court also failed to follow precedent of this Court as well as other courts interpreting similar type statutes.

First, Petitioner seriously misrepresents Georgia law when he asserts that if only depravity of mind is found, the Georgia Supreme Court allegedly reviews the record "to insure there is evidence of torture or aggravated battery of the victim . . . " (Petitioner's brief at 15 and n. 5.) In one case cited by Petitioner in the footnote, *Fair v. State*, 245 Ga. 868, 872, 268 S.E.2d 316, *cert. den.*, 449 U.S. 986 (1980), the Georgia Supreme Court specifically rejected the argument that depravity of mind alone could not support a death sentence. The Court noted that § (b)(7) statute was worded "in the disjunctive, not the conjunctive. It is not required that a trier of fact find the

existence of each disjunctive phrase of the statute, only that at least one phrase of the first clause of the statute exists due to the existence of at least one phrase of the second clause of the statute." *Id.* at 872. Petitioner also conveniently ignores *Conklin v. State*, 254 Ga. 558, 559, 331 S.E.2d 532 (1985), in which the jury rested its death sentence upon finding that the murder "was outrageously or wantonly vile, horrible or inhumane, and that it involved depravity of mind by the perpetrator." Thus, Petitioner's contentions that the Georgia Supreme Court allegedly departed from its own precedent in allegedly sustaining Petitioner's death sentence upon depravity of mind alone lack merit.

Further, the concurring opinion did not reach a conclusion that the evidence was insufficient to support a finding of torture, but merely concluded that given the facts of the case the jury was authorized to conclude that the murder demonstrated Petitioner's depravity of mind. This conclusion was based on the circumstances surrounding the actual commission of the crime and on Petitioner's action with respect to the crime after its commission.

The jury was instructed on both torture and depravity of mind as part of the § (b)(7) charge. (T. 1117-19). Torture was defined as occurring when a "living person is subjected to the unnecessary and wanton infliction of severe physical or mental pain, agony, or anguish," and that torture included "the serious psychological abuse of a victim resulting in severe mental anguish to the victim in anticipation of serious physical harm." (T. 1117). The jury's discretion was also channeled by the instructions that:

> Depravity of mind is a reflection of an utterly corrupt, perverted, or immoral state of mind. In order for you to find beyond a reasonable doubt that the State has proven a depravity of mind on behalf of the [Petitioner], in order to authorize the imposition of a sentence of death, you would need to find not that the Defendant demonstrated a deficiency in moral sense and rectitude, but you would need to find that he demonstrates and maintains an utterly corrupt, perverted, or immoral state of mind.
>
> In determining whether or not the offense of murder in this case involved depravity of mind on the part of [Petitioner], you may consider the age and physical characteristics of the victim, and you may consider the actions of the [Petitioner] prior to and after the commission of the murder.

(T. 1118). The jury in fact found that the murder demonstrated both torture and Petitioner's depravity of mind. (R. 221).

The decision of the Georgia Supreme Court demonstrates that it recognized its duty to analyze the jury's finding under O.C.G.A. § 17-10-35 and under the decisions rendered by this Court. See *Gregg v. Georgia; Godfrey v. Georgia.* The state court did not ignore the decisions of this Court nor its prior decisions construing (b)(7). Rather, that court applied its prior decisions to find the evidence is sufficient in this case to support the jury's finding of this aggravating circumstance and imposition of a death sentence. Petitioner's real complaint is with the

decision in this regard, not with the standard which was applied.

This Court's decision whether to grant certiorari "depends on numerous factors other than the perceived correctness of the judgment" of the court below. *Ross v. Moffitt*, 417 U.S. 600, 617 (1974). The decision below was an appropriate application of Georgia law to the facts of Petitioner's case. Therefore, the issue now raised by Petitioner presents nothing for review by this Court.

III. THIS COURT SHOULD DECLINE TO GRANT CERTIORARI TO REVIEW A DECISION OF THE GEORGIA SUPREME COURT MERELY AFFIRMING THE JURY'S VERDICT AS TO SENTENCE.

In his final question for review, Petitioner asks this Court to grant certiorari on the basis that the Georgia Supreme Court allegedly substituted its judgment for that of the jury and affirmed the death sentence on the basis of a legal theory allegedly not relied upon by the jury. Petitioner contends that under the jury instructions given at his trial, the jury allegedly could have only found depravity of mind in connection with torture; because the Georgia Supreme Court majority allegedly found no evidence of torture, it "must have" relied upon a definition of depravity not submitted to the jury, in violation of *Presnell v. Georgia*, 439 U.S. 14 (1978) and *Hicks v. Oklahoma*, 447 U.S. 343 (1980). Respondent submits that this Court should decline to grant certiorari on this issue as the Georgia Supreme Court did not substitute its own sentencing determination for that of the jury, but, rather, clearly upheld the sentence of death on the depravity of

mind verdict, one portion of the O.C.G.A. § 17-10-30(b)(7) aggravating circumstance returned by the jury in this case.

As noted above, in Petitioner's case the majority of the state court held that the evidence adequately supported the jury's determination under O.C.G.A. § 17-10-30(b)(7) that the murder committed by Petitioner was outrageously or wantonly vile, horrible or inhuman in that it involved depravity of mind and torture. *Hall v. State*, 261 Ga. at 783. The special concurrence of two of the Supreme Court justices, which was required to form the requisite majority to uphold Petitioner's death sentence, determined that it was not necessary to decide whether there was sufficient evidence of torture because the evidence clearly supported the jury's verdict of depravity of mind as well. *Id.* at 785. The concurring opinion thus held that the jury's verdict of finding depravity of mind was sufficient regardless of whether the evidence was sufficient to support the finding of torture and cited *Zant v. Stephens*, 250 Ga. 97, 100, 297 S.E.2d 1 (1982), to support affirming the death penalty when one of two aggravating circumstances might not be upheld.

In *Zant v. Stephens*, 250 Ga. at 97, pursuant to a certified question from this Court, the Georgia Supreme Court held that under state law, the invalidation of one statutory aggravating circumstance did not invalidate a jury's finding of another statutory aggravating circumstance and the decision to impose the death penalty. That holding has since been upheld by the Supreme Court of Georgia in other cases. *See*, e.g., *Ferrell v. State*, 261 Ga.

115, 122, 401 S.E.2d 741 (1991); *Davis v. State*, 255 Ga. 588, 595, 340 S.E.2d 862 (1986).

Petitioner asserts that the Georgia Supreme Court's decision is in conflict with *Presnell v. Georgia*, 439 U.S. at 14 and *Hicks v. Oklahoma*, 447 U.S. at 343. In *Presnell*, the Supreme Court of Georgia had reversed two death sentences predicated on forcible rape because the jury had been charged on both statutory and forcible rape, the jury did not specify which type of rape it found in its guilt/innocence verdict, and statutory rape could not support imposition of a death sentence under O.C.G.A. § 17-10-30(b)(2). The state appellate court, however, upheld a third death sentence based on forcible rape, though the jury had found "kidnapping with bodily harm, aggravated sodomy," because the "evidence in the record supported the conclusion that petitioner was guilty of" forcible rape despite the lack of such finding by the jury. *Id.* at 16. This Court found this substitution of one offense for another which had not been submitted to the jury violated due process, relying on *Cole v. Arkansas*, 333 U.S. 196 (1948). *Presnell*, 439 U.S. at 16. This Court reversed the death penalty based on the Georgia court's determination separate from the jury's finding.

In *Hicks v. Oklahoma*, this Court overturned the sentence of a petitioner convicted of unlawfully distributing heroin whose mandatory sentence of forty years imprisonment was upheld by the Oklahoma court, despite a holding by that court that the mandatory sentencing statute under which the sentence had been imposed was unconstitutional. The new sentencing statute enacted after invalidation of the statute under which

Hicks had been sentenced provided for a range of punishment between 10 and 40 years. The Oklahoma court declined to overturn the 40 year sentence as it was within the range a jury might set under the new statute. This Court held that the decision violated due process since Oklahoma law required that the sentence be fixed by a jury.

In those cases this Court overturned the sentences imposed because the appellate courts made sentencing findings which had not been properly made by any jury. In contrast, the Georgia Supreme Court's decision affirming Petitioner's sentence is based entirely on the jury's finding of depravity of mind as set forth in its verdict. Furthermore, the appellate court's finding of depravity of mind based upon Petitioner's conduct before and after the shooting is not inconsistent with the jury instructions, as quoted above. Petitioner's interpretation of the instructions rest upon his faulty premise that depravity of mind alone may not support imposition of a death sentence, as discussed above. According, Respondent would urge this Court to decline to grant certiorari upon an issue which lacks a factual basis.

CONCLUSION

WHEREFORE, for all of the above and foregoing reasons, this Court should decline to grant the writ of certiorari to the Supreme Court of Georgia as it is clear that the questions presented to this Court by Petitioner were correctly decided under the applicable decisions of

this Court and that no question not previously decided by this Court is presented.

Respectfully submitted,

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